85-448

No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

GORDON ATWELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1985

QUESTION PRESENTED

1. Is the federal constitutional right to confrontation under the Sixth Amendment bridged by a trial court ruling which forecloses cross-examination of the government's key witness concerning his prior arrests for fraud and embezzlement, and admitted securities law violations?

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REPORT OF OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported. A copy of the opinion and the order denying the petition for rehearing are included in the Appendices (A and B).

JURISDICTION

The jurisdiction of this Court is respectfully invoked pursuant to the authority of 28 U.S.C. § 1254(1). The opinion of the United States Court of Appeals for the Tenth Circuit was filed on June 24, 1985, and the petition for rehearing denied on July 18, 1985. This petition for certiorari was filed within sixty (60) days of that date.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Gordon Atwell petitions this Court to grant a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

This petition raises only one issue. The question is whether the defendant in a mail fraud prosecution can be absolutely foreclosed from questioning the alleged victim about his prior arrests and convictions for fraud and embezzlement, and admitted violations of securities laws. The petitioner submits that on the facts of this case, the ruling of the Tenth Circuit is overly broad and emasculates the right to confrontation and cross-examination guaranteed by the Sixth Amendment to the Constitution of the United States.

Gordon Atwell was convicted of mail fraud in violation of 21 U.S.C. §§ 1341 and 1342 (Appendix A, page 2).

On August 17, 1983 the government filed a sixteen-count indictment against Gordon G. Atwell, Jr., alleging mail fraud. Gordon Atwell entered a plea of not guilty. On October 12th and 13th, 1983, a jury trial was held before the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma. The jury

returned a verdict of guilty on all counts. The petitioner filed a motion for new trial and brief in support thereof, on November 8, 1983. On December 16, 1983 the trial court overruled Mr. Atwell's motion for a new trial and imposed sentencing. The petitioner appealed to the United States Court of Appeals for the Tenth Circuit, and that court affirmed his conviction in an opinion issued on June 24, 1985 (Appendix A). On July 8, 1985 Gordon Atwell filed his petition for rehearing, and that petition was denied by order dated July 18, 1985 (Appendix B). Petitioner filed a motion for stay of mandate on July 24, 1985, and the United States Court of Appeals for the Tenth Circuit has not yet ruled upon that motion. Mr. Atwell remains free on bond pending the court's ruling, and this Court's action on the petition for certiorari.

On the date of trial the government filed a motion in limine to prohibit Atwell from presenting his defense, that John Holden (sole owner of Major Oil Company and petitioner's employer) was aware of his activities and could not have been defrauded. The trial court sustained the majority of the government's motion in limine. This issue was raised on appeal and the issue was decided against the petitioner (Appendix A).

The facts which led to the indictment of the petitioner stem from his employment by John Holden and Major Oil Company. From April 1, 1975 through February 1, 1978, Atwell worked for Holden at four oil companies in three states (Tr. 500, 502, 503, 504, 505, 506).[1] In July of 1979, Mr. Atwell returned to work for Mr. Holden for a company

[1] Tr. refers to the transcript of the trial.

called Major Oil Company (Tr. 507, 508). In December of 1979, Holden requested Mr. Atwell move to Enid, Oklahoma, to operate Major Oil Company (Tr. 511, 514).

Mr. Atwell requested he be paid ten percent (10%) of the gross on all wells drilled by Major Oil Company while he was in Enid, as he had always been paid basically a ten percent (10%) commission (Tr. 507, 508, 511, 514). Holden responded that such compensation would result in "a huge amount of salary which would scare off investors" as Atwell's salary would have to be disclosed in the offering book (Tr. 514). Holden, however, assured Atwell he would show Atwell how to take care of that problem and for him not to worry about it (Tr. 514).

Atwell was paid a fifty thousand dollar ($50,0000) salary when he moved to Enid (Tr. 148, 163). Holden earned approximately four million dollars ($4,000,000) on wells drilled by Major Oil Company (Tr. 205, 206). In light of the prior agreement that Holden would show Atwell how he could receive an approximate ten percent (10%) commission, Atwell was getting impatient at his salary level (Tr. 553).

Atwell started a mud company called Discount Drilling Fluids in the summer of 1980 in an effort to increase his salary (Tr. 521). Holden told Atwell to discontinue the mud company as such a blatant method of increasing Atwell's income would have to be disclosed in the offering circulars (Tr. 521, 522, 523). Holden stated, "you are going to have to get rid of that business and you are going to have to start some kind of company where you can get some commissions or some kind of consulting fee" (Tr. 524).

Atwell then started a company called Specialized Consultants (Tr. 524). Through Specialized Consultants, Atwell would be paid a commission by third parties who billed Major Oil Company for work performed. Through Specialized Consultants Atwell could be compensated pursuant to the agreement without being so obvious that the compensation would have to be disclosed to the investors (Tr. 523, 524, 525).

On July 22, 1982, Pecha brothers filed a lawsuit alleging breach of contract and that they had paid Gordon Atwell a five thousand dollar ($5,000) consulting fee (Tr. 154, 476). Atwell immediately contacted his attorney who told him there may be a conflict of interest between Major Oil Company and Atwell and thus Atwell would need separate counsel (Tr. 478). However, Atwell stated, "There is no conflict. Jack knows all about that" (The consulting fee) (Tr. 478, 488).

Major Oil Company denied any knowledge of Atwell's receiving a consulting fee from Pecha brothers and fired Atwell on August 5, 1982 (Tr. 154, 529). They feared now that this had been made public it would have to be disclosed in the five (5) year offering circular under Securities and Exchange Commission Regulations (Tr. 154).

Gordon Atwell's defense at trial was that John Holden, the sole owner of Major Oil Company and the alleged victim of the crime, was fully aware of Specialized Consultants and thus could not have been defrauded. In order to support this theory the petitioner wished to cross-examine Holden concerning his past arrests for "crimen falsi" acts, and violations of the securities laws. Gordon Atwell was

foreclosed from presenting his defense by the trial court's sustaining the majority of the government's motion in limine prohibiting cross-examination on the above matters.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS, IN THIS CASE, APPLIED A STANDARD WHICH EMASCULATES THE SIXTH AMENDMENT RIGHT TO CONFRONTATION AND CROSS-EXAMINATION.

The result of (I) above was to effectively deprive Gordon Atwell of the right to present his defense. John Holden, the government's chief witness and the alleged victim of the crime, testified that he was unaware of Atwell's activities. The petitioner wished to cross-examine Holden and inquire about his past arrests for fraud, and embezzlement, and admitted violations of the securities laws. If Atwell could establish that Holden could not be believed, and that he was fully aware of Atwell's activities, an essential element of the crime would have been defeated, and Gordon Atwell would necessarily have been acquitted.

A. The Government's Motion in Limine, the Defense Objection, and the Court's Ruling

Major Oil Company, solely owned by Jack Holden, was presented to the jury by the government as a company who openly and honestly conducted its business:

> 3. That from, on or about April 1, 1981, until on or about July 31, 1982, in the Western District of Oklahoma, and elsewhere, Gordon C. Atwell, Jr., the defendant, did willfully, knowingly and unlawfully de-

vise and intend to devise a scheme and artifice to defraud Major Oil Company of (1) its right to have its business conducted honestly and openly. (Indictment No. CR83-202-T).

As Jack Holden is the sole owner of Major Oil Company (Tr. 133) the government when contending Major Oil Company conducts its business openly and honestly, contends likewise that Jack Holden conducts business openly and honestly. Through its examination of Holden, the government portrayed Holden as an experienced oil businessman who made every effort to honestly operate his many oil companies in compliance with securities law through the aid of lawyers (Tr. 133, 134, 136, 139, 142, 143, 159, 164, 165, 166).

On cross-examination, Jack Holden responded to questions in such a manner as to continue portraying himself as an honest businessman who was aware of and tries to comply with securities laws (Tr. 177, 179, 186, 187, 191, 203).

The government did nothing to corre t this image of Holden making his best efforts to comply with the securities laws, although it was aware Holden did not conduct his business affairs in compliance with the law. Rather, the government filed a motion in limine to protect its key witness, Jack Holden, from being impeached by his past fraudulent business dealings which resulted in many Securities Commissions issuing restraining orders, injunctions and orders to cease and desist.

The defense objected to such motion and responded with the following list of evidence they wished to introduce against Jack Holden:

(A) That the witness John V. Holden was arrested on March 26, 1967 by the Miami, Florida Police Department on the charge of fraud and swindle.

(B) That the witness John V. Holden was arrested on April 14, 1967 by the County Sheriff's Office in Paynesville, Ohio on the charge of fraud.

(C) That the witness John V. Holden was arrested on February 29, 1968 by the County Sheriff's Office in Paynesville, Ohio on the charge of fraud. Further, that the defendant was convicted of said charge and sentenced to probation. That the witness John V. Holden violated his probation by embezzlement, by use of eight insufficient funds checks and that his probation was revoked on May 24, 1968.

(D) That the witness John V. Holden was arrested by the Oklahoma County Sheriff's Office, Oklahoma City, Oklahoma on March 3, 1976 on the charge of embezzlement by a trustee.

(E) That the witness John V. Holden was arrested by United States Marshal Service, Houston, Texas, on January 31, 1978 on the charge of Count 1 Mail Fraud, Count 2 Conspiracy.

2. . . . that directors have been arrested and convicted for felonies and that the oil companies listed herein have been disbared from ten states for violations of Securities Commission laws.

5. . . . wherein it disclosed that the witness John V. Holden was convicted of misdemeanors of fraud and embezzlement. In fact, the witness John V. Holden was convicted of a felony . . . during the in-court proceedings, the defendant further informed the court that John Holden had

been denied a broker's license for failure to disclose his prior felony conviction (Tr. 90).

In addition to those items outlined above the petitioner discovered during the course of trial and thereafter that John Holden had been convicted of a second fraud charge in 1968 and had been sentenced to a term of 1 to 7 years in the Ohio State Penitentiary. Further, the petitioner learned that Holden had twice applied for expungement of his criminal record on these two convictions, and had twice been turned down by the court. Language in the second denial of application for expungement of the record was quite impeaching of Holden's character for truthfulness:

> Even after serving time in prison for cheating, he persisted in his *dishonest practices* resulting in various real estate licenses being revoked or surrendered under pressure . . . all of these men now hold or formerly held offices of responsibility with a federal office of great responsibility, who apparently had no reason to defame Mr. Holden. Most of the events that they describe in detail happened since the last hearing for expungement and report *a gross lack of honesty on defendants part . . . create doubt in the mind of the court as to the honesty of Mr. Holden* as one of the two stockholders of the company, and indications that the company went into receivership *because of his dishonest withdrawals* . . . coupled with that should be a clean record of keeping himself free from prosecutions, receiverships and injunctions *implying less than honorable conduct.* . . . It is the opinion of the court that it is not consistent with the public interest at this time to order expungement and remove this *warning to the public that Mr. Holden has a felony conviction involving gross dishonesty.* (emphasis added)

(Journal Entry, Case No. 6139, 6140, July 28, 1977, Court of Common Pleas, State of Ohio, Judge Frank Pollock.)[2] The court ruled the proffered evidence impeaching the credibility of the government's key witness was inadmissible except for one 1968 conviction for fraud and the fact that Mr. Holden's felony conviction was improperly disclosed as a misdemeanor conviction (Tr. 93, 100, 116, 117, 194, 432). The basis for the court's exclusion of the evidence was as follows:

1. "I am of the present opinion that the difficulties with the Securities and Exchange Commission and securities laws and the entry of consent judgments and injunctions and the like in the various states are not sufficiently related to or probative of any issue in this trial to be admissible, and in fact pose a threat of confusion to the jury and perhaps prejudice to the government's case, all of which in my present judgment largely override any usefulness that they might have" (Tr. 116).

2. "It does not state that a conviction resulted from that arrest; and the arrest only, in my judgment, is inad-

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[2] The second 1968 conviction for fraud and his subsequent application for expungement of his criminal record on the two convictions were unknown to the petitioner at the time of trial. On appeal to the United States Court of Appeals for the Tenth Circuit the petitioner argued that the government's failure to disclose this information was a violation of the rule as announced by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The appeals court ruled that since the petitioner had not framed the issue in *Brady* terms in his motion for new trial it would consider the information only in connection with his Sixth Amendment Argument. The petitioner accepts this treatment of the evidence, assuming that it would have been discovered had the trial court not granted the government's Motion in Limine.

missible under the rules. Paragraph B is a similar situation resulting in an arrest only, and it is inadmissible, and in each of those instances, the government's Motion in Limine is sustained" (Tr. 91).

3. "Probation was revoked because of embezzlement by the use of some insufficient funds checks. I do not believe that is the type of conviction contemplated by the cited rule, and it being in any event from 1968, I do not believe that the action is properly admissible, but the fraud conviction is" (Tr. 91).

4. The court did not specifically address the revocation of Holden's real estate broker's license.

B. The Rule as Announced by the Court Below on Appeal.

The United States Court of Appeals for the Tenth Circuit held that the trial court had not committed error in granting the government's Motion in Limine. The court held at pages 5 and 6 of its opinion:

> Cross-examination is not an absolute or unlimited right in confrontation. *See Ohio* v. *Roberts,* 448 U.S. 56. As long as the defendant's basic confrontation right is protected, it is within the trial court's discretion to limit the scope of cross-examination. *United States* v. *Valentine,* 706 F.2d 282 (10th Cir.). We indicated in *Valentine* that issues as to limitations of cross-examination take two basic forms. The first is where the trial court precludes inquiry into an entire *area* of relevant cross-examination and there the defendant's confrontation rights may be violated. *Id.* at 287-88. *See also, United States* v. *Jorgensen,* 451 F.2d 516, 519 (10th Cir.) The second type of limitation is directed only to the general extent of cross-examina-

> tion. There, limiting the scope of cross-examination is within the discretion of the trial court. Such limitation will not compel reversal unless an abuse of discretion clearly prejudicial to the defendant occurs. *United States* v. *Valentine*, 706 F.2d at 288. *See also, United States* v. *Alderete*, 614 F.2d 726, 728 to 729 (10th Cir.).

The court has taken what once was a rule of reason (allowing the trial judge to control the orderly presentation of evidence), and has transformed it into a rule which emasculates the Sixth Amendment Right to Confrontation. In *United States* v. *Jorgensen*, 451 F.2d 516 (10th Cir. 1971), the court announced *only* that the Sixth Amendment Right of Confrontation had not been abridged when the defendant was precluded from asking *repetitive* questions. The court was careful to note at page 519:

> Clearly, the right of cross-examination is fundamental in our judicial system. Indeed, we have long held "a full cross-examination of the witness upon subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom such witness is called, and denial is prejudicial error" (citations omitted).

The court failed to find prejudicial error because:

> An examination of the record fails to reveal any erstriction by the trial judge denying cross-examination in an area properly subject to cross-examination, and none is cited by the appellant. All areas of proper cross-examination were available to the defendants. The restriction imposed by the trial court was for the purpose of avoiding *repetitious cross-examination,* thereby alleviating the protracted length of the trial. (*Id.* at 520) (emphasis added).

In *United States* v. *Valentine*, 706 F.2d 282 (10th Cir. 1983), the court held that it was not prejudicial error to limit defense counsel's cross-examination of a police officer concerning the origin of a "batch" of cocaine, because the defense had already been allowed to make the point that the officer could not determine its origin with certainty.

The court below relied upon *United States* v. *Valentine*, 706 F.2d 282 (10th Cir. 1983) and *United States* v. *Jorgensen*, 451 F.2d 516 (10th Cir. 1971), to uphold the trial court's ruling on the government's Motion in Limine. To begin with the rule as announced in *Jorgensen* that the trial court has discretion to limit repetitive cross-examination, and evolve it into the rule as announced by the court below that this discretion extends to entire areas of cross-examination for impeachment purposes, not only defies logic, but emasculates the Sixth Amendment Right to Confrontation and renders it meaningless.

C. The Rule as Announced by the Court Below Is at Odds With the Principles Established by this Court in the Cases of *Alford* v. *United States*, 282 U.S. 687, 75 L.Ed. 624, 51 Sup.Ct. 218, *Smith* v. *Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 Sup.Ct. 748 (1968) and *Davis* v. *Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 Sup.Ct. 1105 (1974).

In *Alford* v. *United States*, 282 U.S. 687, 75 L.Ed. 624, 51 Sup.Ct. 218, this Court held:

> *It is the essence of a fair trial that reasonable latitude be given the cross-examiner*, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his*

> *proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them* . . . to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . .
>
> The extent of cross-examination with respect to an appropriate subject of inquiry is within the discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted . . . *but no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked.* (emphasis added)

The court thus stated that while the trial court may properly control the orderly presentation of evidence at trial and limit repetitive questions *the Sixth Amendment Right to Confrontation requires that the defendant be allowed to place the witness in his proper setting.* In *Smith* v. *Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 Sup.Ct. 748, this Court held at page 131:

> In the present case there was not, to be sure, a complete denial of all right of cross-examination. But the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is an issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the wit-

> ness who he is and where he lives. The witness name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Likewise, in the instant case "there was not, to be sure, a complete denial of all right of cross-examination." However, Gordon Atwell was completely foreclosed from illustrating to the jury the fact that John Holden could not be believed. Such a prohibition doubtless left the jury with the impression that Mr. Atwell was engaged in a speculative and baseless line of attack on the credibility of Holden. This was not only unfair to Atwell but was unfair and misleading to the jury.

In *Davis* v. *Alaska*, 415 U.S. 308, 39 L.Ed.2d 347, 94 Sup.Ct. 1105 (1974), this Court held at page 116:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions in memory, but the cross-examiner has traditionally been allowed to impeach, i.e. discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average truthworthy citizen to be truthful in his testimony.* The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack

> on the witness credibility is effected by means of cross-examination directed toward revealing possible bias's, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. *The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'* (citations omitted). We have recognized that the exposure of a witness' motivation in testifying is a proper and important right of cross-examination. (emphasis added)

In direct contradiction to the rule concerning partiality as announced by the court in *Davis, supra,* the court below stated at page 6 of the opinion "the evidence the appellant sought to introduce, as mentioned, concerned John Holden's problems with the Securities and Exchange Commission and was not directly relevant to the type of fraud with which the appellant was charged" (Appendix A). To the contrary, if John Holden admitted that he was aware of the petitioner's activities he would have again been in violation of the Securities and Exchange Commission regulations. The desired cross-examination went directly to motive and partiality which is "always relevant as discrediting the witness and affecting the weight of his testimony" (*Davis* v. *Alaska, supra,* page 316).

The petitioner recognizes that the trial court must be allowed the sound discretion to prohibit repetitive cross-examination. There is also merit in the Tenth Circuit's dichotomy between an *area* of cross-examination and the *extent* of cross-examination. However, to develop that dichotomy doctrine to include in "*extent*" situations where the defendant is allowed to cross-examine the government's

key witness about one conviction, and then foreclosed from all other impeachment cross-examination concerning arrests and securities law violations is in direct conflict with the sound principles enunciated by this Court.

II. THERE IS A DISAGREEMENT AMONG THE CIRCUITS AS TO THE "EXTENT" OF CROSS-EXAMINATION WHICH IS REQUIRED UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The rule as announced by the court below was that it was within the sound discretion of the trial court to limit the "extent" of cross-examination of the government's key witness. Counsel for the petitioner has been unable to find a court of appeals decision from any other circuit which would so limit the "extent" of cross-examination.

In *United States* v. *Leake*, 642 F.2d 715 (4th Cir. 1980), a case with facts extremely similar to those in this case, the United States Court of Appeals for the Fourth Circuit ruled that the limitation on cross-examination was clearly prejudicial error. The court stated at page 717:

> On cross-examination, defense counsel sought to discredit Johnson by showing that he had been involved in *numerous fraudulent financial schemes*. The district court permitted defense counsel to elicit responses from Johnson showing that he had been indicted for bank fraud, that he had testified for the government in a criminal bank fraud case, that he had knowledge of his church's having arranged loans for 18 persons in Pennsylvania in 1974, and that he had 'aided his pastor' in obtaining those loans. However, the district court sustained the prosecution's objections to defense counsel's query of Johnson concerning his procurement of a loan from a Pennsylvania bank and,

> after his failure to repay the loan, the entering of a default judgment against him. Out of the jury's presence, defense counsel argued that this question and other similar ones were proper because through them he was attempting to show a 'pattern of fraudulent activity' on Johnson's part to demonstrate his motive for testifying against defendants, that of incriminating them to save himself.
>
> The district court ruled the defense counsel could not ask further questions of Johnson regarding 'prior conduct not resulting in convictions or arrest.' (Emphasis added)

The court held at page 719:

> *The district court's limitation of defense counsel's cross-examination of Johnson was clearly prejudicial error. The conduct of Johnson the defense counsel sought to expose was probative of Johnson's truthfulness.* The questions defense counsel asked Johnson outside of the jury's presence and the document defense counsel placed in the record listing the matters he sought to inquire about indicate that Johnson had been indicted in New Jersey for 'obtaining money under false pretenses,' a warrant for his arrest for 'defrauding an innkeeper' had been issued in North Carolina, six checks drawn by him had been returned for insufficient funds, numerous default judgments had been entered against him in civil actions seeking repayment of loans, and he, or firms that he controlled, had entered numerous contracts to build churches, receive payment, but failed to complete the work due under those contracts. These matters certainly establish a pattern of fraudulent activity that, if revealed, would have placed Johnson's credibility in question. (emphasis added)

It was concerning exactly this type of conduct that defense counsel wished to cross-examine John Holden. Under the facts of the instant case the United States Court of Appeals for the Fourth Circuit would clearly have found prejudicial error.

In *United States* v. *Partin*, 493 F.2d 750 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit held that it was prejudicial error for the trial court to limit cross-examination of the government's key witness concerning the amount of money that he had received for his agreement to testify for the government. The court stated at page 759:

> In response to this situation we are well aware that the trial record shows the jury to have been informed of every facet of this matter except the *total* of the money the government spent on behalf of McClanahan and his family. Additionally, it is true that on cross-examination counsel for Partin extracted from McClanahan that on at least three occasions he had sworn falsely, in writing, that Partin was not involved in the Bergeron incident. Moreover, he was compelled to admit that he had been convicted of forgery on one occasion and of theft on another. Consequently, McClanahan stood before the jury as a devastatingly impeached witness, both as a self-confessed perjurer and as a thrice convicted criminal.
>
> The general reactions would be that although McClanahan was thus unclothed of veracity in general, the jury nevertheless believed that he was telling the truth about Partin's connection with the Bergeron affair. This would lead to the concluson that the specific knowledge of the $26,000 item would not have turned the tide.

The court ruled that the defense should have been allowed to cross-examine concerning the amount of the payments. The court held at page 759:

> They were unusually high and McClanahan would never have received them had it not been for his agreement to testify for the government. *It's impact, if any, on his credibility was for the jury, not for the prosecutors or the court.* (emphasis added)

In direct conflict wth the rule as announced by the Tenth Circuit is the case of *United States* v. *Uramoto*, 638 F.2d 84 (9th Cir. 1980). In *Uramoto* the trial judge allowed the defendant to cross-examine a DEA informant about threats that he had made to the defendant himself, but would not allow inquiry into threats that the DEA agent had made against others. The court held at page 87:

> *We have found cross-examination impermissibly limited both when the defendant was not given adequate scope to impeach a witness' credibility, see,* e.g. *Burr* v. *Sullivan*, 618 F.2d 583, 587-88 (9th Cir. 1980) (arson defendant has right to cross-examine juvenile witnesses concerning their admission of 100 burgularies to show their bias), *and when matters clearly relevant to crucial issues were excluded, see,* e.g., *United States* v. *McLister*, 608 F.2d 785, 788 (9th Cir. 1979) . . . *in the instant case, the excluded cross-examination could have colored the jury's perception of Smelser's credibility.* In addition, it concerned the heart of *Uramoto's* defense. We therefore conclude that its exclusion was error. In reaching this conclusion, we are influenced by the fact that the only issue in the case was whether Uramoto acted out of fear and by the fact that the government concedes that the paid informant has a history of threatening those with whom he came in contact.

> *Although the government's case against Uramoto is strong, the harmless error doctrine is inapplicable. The Supreme Court has declared repeatedly that a denial of the right of cross-examination is 'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'* (citations omitted) Deprivation of the right to a full and robust cross-examination of a paid government informant on a matter that is likely to cast light on which is concedely the only issue in the case cannot be cured by the absence of any specific showing of prejudice. (emphasis added)

In the instant case the only issue was whether Holden was aware of the petitioner's activities. Holden's prior arrests, convictions, and securities laws violations were clearly probative of his truthfulness. As the United States Court of Appeals for the Ninth Circuit ruled in the *Uramoto* case, "the harmless error doctrine is inapplicable."

In *United States* v. *Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), the United States Court of Appeals for the Eleventh Circuit held that although defense counsel had been allowed to impeach the government's key witness, the scope of cross-examination had been unconstitutionally limited. The court held at page 1160:

> In its brief and during oral argument, the government urged that the scope of cross-examination is a matter within the discretion of the district court. We have repeatedly held, however, that 'this discretionary authority . . . comes into play only after there has been permited as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. *Green* v. *Wainwright*, 634 F.2d 272, 275 (5th Cir. 1981), quoting *United States* v. *Bass*, 490 F.2d 846, 858 n.12 (5th Cir. 1974).

The court went on to hold at page 1163:

> These rulings by the district court constituted an abuse of discretion contradicting the Supreme Court and former Fifth Circuit authority on the right of confrontation in general and the right to examine the psychiatric history of adverse witnesses in particular.

In each of the above cases counsel for the defense was allowed to inquire into an "area" concerning the credibility of the government's witness. In each of the cases the trial court limited the "scope" of cross-examination, and prohibited defense counsel from fully developing the credibility issue that was the basis for the defense. Those courts did not resort to an "area" versus "extent" dichotomy in order to uphold the conviction of the respective defendants. Instead, they ruled that the Sixth Amendment Right to Confrontation precludes such limitation even if it can rightfully be called a mere limitation on the "extent" of cross-examination. These rulings are clearly at odds with the decision of the court below in the instant case, and represent an irreconcilable rift of authority. Allowed to stand, the opinion below lays the ground work for the continued erosion of the Sixth Amendment Right to Confrontation, and the continued divergence of the United States Court of Appeals for the Tenth Circuit from the better reasoned approach and constitutionally sound principles enunciated by the respective circuits enumerated above.

CONCLUSION

Petition for a Writ of Certiorari should be granted and the judgment of conviction should be reversed and the cause remanded for a new trial with instructions to the trial court to allow cross-examination of John Holden concerning his prior dishonest activities.

Respectfully submitted,

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September, 1985

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were served on the required parties by placing same in the United States Mail with postage fully prepaid, this ..... day of September, 1985, to:

William S. Price
United States Attorney
Federal Court House
Oklahoma City, Oklahoma 73102

Stephen Jones

APPENDIX A

PUBLISH

[Filed June 24, 1985]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

84-1012

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	(D.C. Criminal No. 83-202-T)
GORDON G. ATWELL, JR., Defendant-Appellant.	)	

Appeal From The United States District Court
For The Western District of Oklahoma

Submitted on the briefs:

Stephen Jones and Susan McNaughton of Jones, McNaughton & Blakley, Enid, Oklahoma, for Defendant-Appellant.

William S. Price, United States Attorney, Frank Michael Ringer, Assistant United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before LOGAN and SETH, Circuit Judges, and SAFFELS, District Judge.*

PER CURIAM.

Gordon Atwell appeals his conviction under 18 U.S.C. §§ 1341 and 1342 for mail fraud and aiding and abeting.

*Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

[APPENDIX]

He was found guilty by a jury on all sixteen counts of the indictment. Appellant bases his appeal on asserted errors in evidentiary rulings and on limitations placed on cross-examination of a government witness.

The facts of the case arise out of the oil fields of Oklahoma. The appellant worked for Major Oil Company, a Texas corporation engaged in promoting oil well drilling ventures. It assembled limited partnerships for wells and acted as the general partner. The company then hired oil field contractors to drill and complete the wells.

Over the past decade John Holden who was president of Major had headed a succession of similar companies. These were operations where a group of salesmen would solicit by telephone the partcipation of investors in drilling ventures. The appellant had been one of these salesmen and had been associated with John Holden since 1972. The two were friends. Evidently the appellant received as compensation a percentage of the amounts invested by the limited partners. John Holden was to be the principal witness for the government in the prosecution of appellant.

John Holden sent the appellant to Oklahoma to supervise the drilling and completion of the wells for Major. The appellant was in charge of all local activities, hired the subcontractors and supervised the drilling. While succeeding in making Major's Oklahoma venture more profitable the appellant also embarked on a kickback scheme. Because he had the authority to contract with third parties to provide materials and services, he instructed his suppliers and subcontractors to add a certain amount to their invoices in excess of what they normally would have charged. Major Oil Corporation then mailed payment to these suppliers. After receiving payment the suppliers paid the added amount to the appellant. He used a dummy consulting firm to disguise the scheme. The evidence shows the appellant never performed any consulting services.

Admiting that he took the kickbacks, the appellant's theory of defense was based on the assertion that John Holden, Major's president, knew and approved of the scheme. Thus because Major Oil and Holden were essentially interchangeable the company could not have been defrauded if its president had knowledge of the kickbacks. John Holden's knowledge would eliminate an essential element of the crime.

The appellant testified John Holden knew all along about the kickbacks and under his version the primary inducement for his moving to Oklahoma was that he would receive ten percent of the Oklahoma ventures. He also testified that John Holden cautioned the appellant that the ten percent cut could not be disclosed in the company's prospectuses. As a consequence the appellant under his version was supposedly encouraged to surreptitiously concoct his own methods for generating the expected compensation.

John Holden as a witness for the government testified he neither encouraged nor had any knowledge of the kickback scheme. Another corporate officer gave substantially similar testimony and also testified about another side venture of the appellant. The corporation learned that the appellant had begun a drilling mud business called Discount Drilling Fluids. The Appellant when acting as an employee of Major would purchase the services of Discount Drilling. When the arrangement came to light, the appellant was instructed to choose between working for one or the other firm. He chose to remain with Major and it was at this point that John Holden ostensibly encouraged him to find a less visible way to make his money. The government argued at trial that it was inconsistent to suppose the corporation would discourage the appellant from engaging in one scheme merely to encourage him in undertaking another. It was critical, therefore, that the appellant attack John Holden's credibility as an honest businessman who had been defrauded by a trusted employee.

The defense indicated that it would introduce a great deal of evidence concerning John Holden's past in the business promotion world. The government made a pretrial motion in limine to prevent the evidence from being admitted. The evidence consisted of evidence of a prior felony conviction for fraud with a revocation of parole; evidence of prior arrests on fraud charges; evidence of federal and state violations of securities laws and the entry of consent judgments and injunctions on those violations; evidence that John Holden had characterized his felony conviction as a misdemeanor in the prospectus of one of the limited partnerships.

The trial court allowed the defense to use the prior felony fraud conviction even though it had occurred more than ten years before. The court also allowed the defense to use the mischaracterization of the fraud conviction in the prospectus. The court granted the government's motion insofar as the evidence of prior arrests and securities violations. Thus the appellant was precluded from examining the witness on those matters. He was thus examined on the felony conviction for fraud and its mischaracterization.

Appellant presents three issues on appeal. First, did the trial court's limitation of the scope of Holden's cross-examination deny the appellant his right of confrontation under the Sixth Amendment? Second, did the government suppress evidence of Holden's past in violation of Brady v. Maryland, 373 U.S. 83? Finally, did the court err in allowing the government to put on evidence of similar kickbacks received by appellant that were not charged in the indictment?

Cross-examination is not an absolute or unlimited right in confrontation. See Ohio v. Roberts, 448 U.S. 56. As long as the defendant's basic confrontation right is protected, it is within the trial court's discretion to limit the scope of cross-examination. United States v. Valentine, 706 F.2d 282 (10th Cir.). We indicated in *Valentine* that issues as to

limitations of cross-examination take two basic forms. The first is where the trial court precludes inquiry into an entire *area* of relevant cross-examination and there the defendant's confrontation rights may be violated. *Id.* at 287-88. *See also* United States v. Jorgenson, 451 F.2d 516, 519 (10th Cir.). The second type of limitation is directed only to the general *extent* of cross-examination. There limiting the scope of cross-examination is within the discretion of the trial court. Such limitations will not compel reversal unless an abuse of discretion clearly prejudicial to the defendant occurs. United States v. Valentine, 706 F.2d at 288. *See also* United States v. Alderete, 614 F.2d 726, 728-29 (10th Cir.).

The record demonstrates in the present case that the appellant was not barred from pursuing an entire area of relevant inquiry. The trial court allowed defense counsel to examine John Holden on his felony conviction. When the witness attempted to equivocate on the mischaracterization in the prospectus defense counsel required the witness to read aloud the relevant portion of the prospectus containing the misstatement. Record, Vol. VI at 188. Thus it is clear the appellant was able to develop the credibility issue. The court simply limited the scope of the inquiry into the witness' past and, accordingly, the court's actions must be measured against the second element of the *Valentine* test.

The evidence the appellant sought to introduce, as mentioned, concerned John Holden's problems with the Securities and Exchange Commission and was not directly relevant to the type of fraud with which the appellant was charged. As a consequence, the trial court viewed the evidence as potentially confusing to the jury. None of the evidence dealing with John Holden's violations of securities laws involved a kickback scheme. The court acted within its discretion in limiting the scope of credibility cross-examination.

[APPENDIX]

Federal Rule of Evidence 403 permits the trial court to exclude what might otherwise be admissible evidence when the danger of confusion of the issues or misleading the jury substantially outweighs the probative value of the evidence. We agree with the trial court that the potential for confusion surpassed any utility the evidence might have. In any event, the evidence was cumulative as the honesty of the witness had already been made an issue.

The same is true of the evidence of John Holden's prior arrests that did not result in convictions. The appellant argues that Federal Rule of Evidence 608(b) compels the admission of the evidence of the arrests because they bear on Holden's truthfulness. Rule 608(b) does no such thing. The trial court in its discretion may allow inquiry into the prior conduct of a witness concerning his character for truthfulness. The rule does not require inquiry. Additionally, Rule 608(b) is still subject to the balancing under Rule 403 mentioned above.

We cannot conclude that disallowing the contested evidence was an abuse of discretion. The ruling satisfied appellant's confrontation rights.

The appellant next argues that his due process right to a fair trial was denied by the government's suppression of "exculpatory" evidence. The suppression assertedly constituted a violation of the rule set out in Brady v. Maryland, 373 U.S. 83. The information which is asserted that the government did not disclose concerned a second felony conviction of Mr. Holden in 1968. The conviction occurred at roughly the same time as the conviction upon which the court allowed cross-examination. It was for drawing a check without funds with intent to defraud. The appellant asserts that disclosure of this additional felony conviction should have been made to the jury.

On appeal this point is framed by appellant as a *Brady* v. *Maryland* issue, but it was quite different in the trial

court. Appellant makes this clear in his brief in this court wherein he describes what took place at trial:

> "Following the trial, in support of the Motion for New Trial, the defendant filed as exhibits true and correct copies of all of the material that it would have relied upon had cross-examination been permitted. This material was not introduced in evidence at the trial because of the court's ruling on the Motion In Limine. The substance of the material, however, was made as a part of the response to the Motion In Limine and the offer of proof."

There is attached to appellant's brief in support of motion for new trial as "Exhibit "J", "which would have been relied upon had cross-examination been permitted," a copy of an order from the Ohio Department of Licensing and Regulation wherein the Director recites as a fact supporting the revocation of John Holden's real estate license that he had been convicted of two felonies in 1968 in Ohio and the details were described.

The appellant's point in his motion for new trial was that the "material" was not introduced because of the ruling on the motion in limine. The appellant thus acknowledges that *at trial* he had all the information recited in the exhibits to his brief in support of his motion for new trial, as the above quotation recites. There was no *Brady* issue presented to the trial court. The appellant cites United States v. Agurs, 427 U.S. 97, in its brief in support of motion for new trial but this refers to *all the evidence* excluded by the ruling on the motion in limine and is accompanied with a lack of fair trial argument arising from the ruling. Since no *Brady* issue was before the trial court we will not consider the issue on this appeal. We must treat the felony convictions, the arrests, the prohibitions from doing business in certain states and the security violations all as part of the issue of the restriction on cross-examination, thus within the ruling on the motion in limine as described above.

The appellant further contends that the trial court erred in admitting evidence against him of uncharged crimes. The evidence consisted of testimony by various suppliers that they had paid Specialized Consultants, the appellant's dummy firm, kickbacks for doing business with Major Oil. The testimony was offered under Rule 404(b). The trial court allowed the evidence under the theory that it showed the appellant's intent and planning, and that it demonstrated the scope of the kickback scheme. The court gave the appropriate limiting warning to the jury, instructing that the evidence of similar activities on the part of the appellant was not offered to prove he acted in conformity with the pattern of uncharged crimes.

The appellant argues that the court failed to properly perform the balancing test of Rule 403 as to this evidence. The appellant contends that because he admitted taking kickbacks the evidence of other similar acts was not reasonably necessary to the government's case. Thus because the appellant's defense rested on the premise that he could not defraud a company whose sole shareholder approved his actions, it was prejudicial to allow further evidence of acts he had already admitted. Under this view the evidence was cumulative; its probative value did not outweigh its substantial prejudicial effects.

After initially allowing some of the 404(b) evidence, the court questioned whether further evidence of the same sort was necessary in light of the appellant's admissions. The government acknowledged that the appellant admitted he received the money; the issue was *how* he received the money. Thus the government argued that the evidence was designed to show the appellant's intent and whether he was authorized to take the kickbacks. Under this view the evidence is relevant to the issue of the nature of the scheme. The trial court ultimately agreed with the government. Accordingly the court allowed the evidence for the limited purpose of showing the nature of the scheme, to rebut the contention the scheme had been authorized by John Holden

and to show the manner in which the transactions occurred. We conclude that the trial court did not abuse its discretion in admitting the evidence.

In Morgan v. United States, 355 F.2d 43 (10th Cir.), we concluded that "[e]vidence of other crimes than the one charged must however have a real probative value, and not just a possible worth on issues of intent, motive, absence of mistake or accident, or to establish a scheme or plan." *Id.* at 45. In the case before us, the evidence of other similar and recent kickbacks has real probative value when offered to show the appellant's overall plan.

We have also required the evidence to bear a clear and logical connection with the case actually being tried. United States v. Burkhart, 458 F.2d 201, 206 (10th Cir.). Such a connection is apparent here. In United States v. Parker, 469 F.2d 884 (10th Cir.), we reiterated that the evidence cannot be of remote and unconnected offenses. Proximity in time is also necessary. United States v. Nolan, 551 F.2d 266, 271 (10th Cir.). Thus, where the evidence tends to show intent, planning, or the existence of a common scheme, where the evidence has real probative value, and the uncharged acts bear a logical connection both in time and characteristics with the charged offense, the trial court may allow its admission. The court has broad discretion under Rule 403 to compare the value of the evidence with its possible prejudicial impact. Absent a clear abuse of discretion, the determination of the trial court will not be disturbed. We fail to find a clear abuse of discretion in the present case. Thus we find no error in the admission of the evidence.

The court's evidentiary rulings and the record as a whole demonstrate no reversible error. Accordingly, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM — July 18, 1985

Before Honorable William E. Holloway, Jr., Chief Judge, Honorable Oliver Seth, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges, and Honorable Dale E. Saffels, District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 84-1012
vs.	)	
GORDON G. ATWELL, JR., Defendant-Appellant.	)	(D.C. No. CR-83-202-T)

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

*Of the District of Kansas, sitting by designation.